

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 DITECH FINANCIAL LLC and FEDERAL  
4 NATIONAL MORTGAGE ASSOCIATION,

5 Plaintiffs

6 v.

7 WOODCREST HOMEOWNERS  
8 ASSOCIATION, et al.,

Defendants

Case No.: 2:16-cv-02636-APG-DJA

**Order (1) Granting Plaintiffs' Motion for  
Summary Judgment, (2) Dismissing as  
Moot Alternative Damages Claims, and  
(3) Denying as Moot Woodcrest's Motion  
for Summary Judgment**

[ECF Nos. 40, 50]

9 Plaintiffs Ditech Financial LLC (Ditech) and Federal National Mortgage Association  
10 (Fannie Mae) sue to determine whether a deed of trust still encumbers property located at 3609  
11 Broxburn Street in Las Vegas following a non-judicial foreclosure sale conducted by a  
12 homeowners association (HOA), defendant Woodcrest Homeowners Association (Woodcrest).  
13 Ditech and Fannie Mae seek a declaration that the deed of trust was not extinguished by the  
14 HOA foreclosure sale. They also assert alternative damages claims against Woodcrest and its  
15 foreclosure agent, defendant Absolute Collection Services, LLC. Defendant Abacus 8, LLC  
16 (Abacus) purchased the property at the foreclosure sale.

17 Ditech and Fannie Mae move for summary judgment, arguing that the HOA foreclosure  
18 sale did not extinguish the deed of trust because the federal foreclosure bar in 12 U.S.C.  
19 § 4617(j)(3) preserved Fannie Mae's property interest as a matter of law. Abacus responds that  
20 the plaintiffs' declaratory relief claims are untimely. Woodcrest joins Abacus's response and  
21 contends that if I hold that the deed of trust survived the foreclosure sale, then I should dismiss  
22 the alternative damages claims as moot. In reply, the plaintiffs agree that if they prevail on the  
23 declaratory relief claim, then the damages claims are moot.

1 The parties are familiar with the facts, so I do not repeat them here except where  
2 necessary. I grant the plaintiffs' motion because their declaratory relief claim is timely and the  
3 federal foreclosure bar precluded the HOA foreclosure sale from extinguishing the deed of trust.  
4 Consequently, I dismiss as moot their alternative damages claims and I deny as moot  
5 Woodcrest's motion for summary judgment.

## 6 **I. ANALYSIS**

7 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to  
8 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
9 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."  
10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence  
11 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

12 The party seeking summary judgment bears the initial burden of informing the court of  
13 the basis for its motion and identifying those portions of the record that demonstrate the absence  
14 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
15 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
16 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
17 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) ("To defeat  
18 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
19 fact that could satisfy its burden at trial."). I view the evidence and reasonable inferences in the  
20 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
21 F.3d 915, 920 (9th Cir. 2008).

22 The federal foreclosure bar in 12 U.S.C. § 4617(j)(3) provides that "in any case in which  
23 [FHFA] is acting as a conservator," "[n]o property of [FHFA] shall be subject to . . .

1 foreclosure[] or sale without the consent of [FHFA].” The plaintiffs thus argue that the HOA  
2 sale could not extinguish Fannie Mae’s interest in the property because at the time of the sale,  
3 FHFA was acting as Fannie Mae’s conservator and Fannie Mae owned the note and deed of  
4 trust. Abacus concedes that if Fannie Mae owned the note and deed of trust at the time of the  
5 sale, the federal foreclosure bar applies. However, it contends that the plaintiffs’ claims are  
6 time-barred because a three-year limitation period applies under the Housing and Economic  
7 Recovery Act of 2008 (HERA). The plaintiffs reply that a six-year limitation period applies  
8 under HERA.

9 I have previously ruled that the four-year catchall limitation period in Nevada Revised  
10 Statutes § 11.220 applies to claims under Nevada Revised Statutes § 40.010 brought by a  
11 lienholder seeking to determine whether an HOA sale extinguished its deed of trust. *See Bank of*  
12 *Am., N.A. v. Country Garden Owners Ass’n*, No. 2:17-cv-01850-APG-CWH, 2018 WL 1336721,  
13 at \*2 (D. Nev. Mar. 14, 2018). The HOA foreclosure sale was conducted on November 15,  
14 2011, and the trustee’s deed upon sale was recorded two days later. ECF No. 40-10. The  
15 plaintiffs filed suit more than four years later, on November 15, 2016. ECF No. 1. Thus, if this is  
16 the applicable limitation period, the plaintiffs’ declaratory relief claim would be untimely.

17 However, HERA’s extender provision in 12 U.S.C. § 4617(b)(12) applies here. That  
18 statute extends the limitation period for claims brought by the FHFA as conservator for Fannie  
19 Mae. Contract claims must be brought within the longer of six years or the applicable state law  
20 period, and tort claims must be brought within the longer of three years or the applicable state  
21 law period. 12 U.S.C. § 4617(b)(12)(A). Courts have interpreted § 4617(b)(12) to govern any  
22 action brought by FHFA as conservator, and thus one of these two limitation periods must apply  
23 even to a claim like the plaintiffs’ declaratory relief claim that is neither a contract nor a tort

1 claim. *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 144 (2d Cir. 2013); *Fed. Hous. Fin.*  
2 *Agency v. LN Mgmt. LLC, Series 2937 Barboursville*, 369 F. Supp. 3d 1101, 1108-09 (D. Nev.  
3 2019), *reconsideration granted, order vacated in part*, No. 2:17-cv-03006-JAD-EJY, 2019 WL  
4 6828293 (D. Nev. Dec. 13, 2019); *FHFA v. Royal Bank of Scotland Grp. PLC*, 124 F. Supp. 3d  
5 92, 95-99 (D. Conn. 2015); *FHFA v. HSBC No. Amer. Holdings, Inc.*, Nos. 11cv6189 (DLC),  
6 11cv6201 (DLC), 2014 WL 4276420, at \*5 (S. D N.Y. Aug. 28, 2014); *In re Countrywide Fin.*  
7 *Corp. Mortgage-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1067 (C.D. Cal. 2012).

8 I determined in a prior case that a declaratory relief claim like the one the plaintiffs assert  
9 in this case is more akin to a contract claim than a tort claim, so the six-year limitation period is  
10 the correct one. *See Nationstar Mortg. LLC v. 312 Pocono Ranch Tr.*, No. 2:17-cv-01783-APG-  
11 DJA, 2019 WL 5963963, at \*1-2 (D. Nev. Nov. 13, 2019). Other judges in this district agree.  
12 *See, e.g., Nationstar Mortg. LLC v. Copper Creek Homeowner Ass'n*, No. 2:17-cv-02624-RFB-  
13 BNW, 2019 WL 4777311, at \*4 (D. Nev. Sept. 29, 2019); *LN Mgmt. LLC, Series 2937*  
14 *Barboursville*, 369 F. Supp. 3d at 1110. And other judges have concluded that the extender  
15 statute can be invoked by Fannie Mae or its servicer even though the extender statute states that  
16 it applies to claims brought by the FHFA. I agree with the reasoning of these decisions that  
17 Fannie Mae and its servicer are FHFA's agents in protecting the conservatorship assets and thus  
18 may seek the benefit of HERA's six-year extender statute even if FHFA is not a party to the  
19 case. *See Ditech Fin. LLC v. Talasera & Vicanto Homeowners' Ass'n*, No. 2:16-cv-02906-JAD-  
20 NJK, 2019 WL 6828287, at \*2 (D. Nev. Dec. 13, 2019); *Copper Creek Homeowner Ass'n*, 2019  
21 WL 4777311, at \*3-4. Consequently, the plaintiffs' declaratory relief claim in this case is  
22 governed by the six-year limitation period in HERA and is timely.

1 The federal foreclosure bar preempts Nevada law and precludes an HOA foreclosure sale  
2 from extinguishing Fannie Mae's interest in property without FHFA's affirmative consent.  
3 *Berezovsky v. Moniz*, 869 F.3d 923, 927-31 (9th Cir. 2017). In *Berezovsky*, the Ninth Circuit  
4 accepted as proof of ownership the same type of evidence of ownership as offered in this case.  
5 *Id.* at 932-33. Consequently, the plaintiffs have met their initial burden of showing Fannie Mae  
6 owned an interest in the property at the time of the sale.

7 Abacus has not presented evidence raising a genuine dispute about Fannie Mae's interest.  
8 The fact that Fannie Mae's name does not appear as the deed of trust beneficiary does not raise a  
9 genuine dispute that it does not own the note and deed and trust. *See id.* at 932 (stating that  
10 Freddie Mac's interest in the property was "valid and enforceable under Nevada law" even  
11 though "the recorded deed of trust names only the owner's agent"); *Ditech Fin. LLC v. Saticoy*  
12 *Bay LLC Series 8829 Cornwall Glen*, 794 F. App'x 667, 668 (9th Cir. 2020) (rejecting  
13 purchaser's argument that because "Fannie Mae did not appear as the deed of trust's record  
14 beneficiary" it did not have a valid property interest); *JPMorgan Chase Bank, N.A. v. 7290*  
15 *Sheared Cliff Lane Un 102 Tr.*, 804 F. App'x 488, 491 (9th Cir. 2020) (stating that Fannie Mae's  
16 business records and declaration of its employee were "sufficient evidence of Fannie Mae's  
17 ownership of the loan even if the recorded deed of trust names only . . . Fannie Mae's loan  
18 servicer" (quotation omitted)).

19 As a result, I grant the plaintiffs' motion for summary judgment on their declaratory  
20 relief claim. I dismiss as moot the plaintiffs' alternative damages claims against Woodcrest and  
21 Absolute, so I also deny as moot Woodcrest's motion for summary judgment.

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1 **II. CONCLUSION**

2 I THEREFORE ORDER that the plaintiffs' motion for summary judgment (**ECF No. 40**)  
3 **is GRANTED**. The clerk of court is instructed to enter judgment in favor of the plaintiffs and  
4 against defendant Abacus 8, LLC as follows: It is hereby declared that the non-judicial  
5 foreclosure sale conducted by Woodcrest Homeowners Association on November 15, 2011 did  
6 not extinguish the deed of trust and the property located at 3609 Broxburn Street in Las Vegas,  
7 Nevada remains subject to the deed of trust.

8 I FURTHER ORDER that the plaintiffs' alternative damages claims against defendants  
9 Woodcrest Homeowners Association and Absolute Collection Services, LLC are dismissed as  
10 moot.

11 I FURTHER ORDER that defendant Woodcrest Homeowners Association's motion for  
12 summary judgment (**ECF No. 50**) **is DENIED as moot**.

13 I FURTHER ORDER that the clerk of court is instructed to close this case.

14 DATED this 9th day of June, 2020.

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18 ANDREW P. GORDON  
19 UNITED STATES DISTRICT JUDGE  
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